1982 WL 189401 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 12, 1982

***1 RE: Insolvency Fund**

Mr. John E. Nabors
Executive Director
S. C. Industrial Commission
1800 St. Julian Place
Columbia, SC 29204

Dear John:
This is in reply to your recent request for an opinion concerning the insolvency fund recently enacted as an amendment to Section 42-7-200, Code. You have requested our assistance in determining a workable procedure for the implementation of this fund. You also requested an opinion as to whether or not the above cited statute is retroactive and, if not, the effective date of the statute.

The statute requires an award and a certification of insolvency by the Industrial Commission before any payments are made from the insolvency fund. This creates the necessity of having someone within the Industrial Commission, rather than the State Fund, make determinations on these cases. From a review of the statute and from discussions with members of your staff and that of the State Fund, it would appear that the compliance section of the Industrial Commission would be the most logical choice to handle this matter. It would appear that most claims would originate in the normal fashion and would trigger routine compliance action if no payment is made. As you know, the Industrial Commission presently handles numerous cases where the required forms have not been submitted or coverage has not been obtained by the employer. At this point the case is routinely given to a compliance officer for investigation. In cases where the matter cannot be reconciled by the compliance officer, a Rule to Show Cause hearing is scheduled before one of the Commissioners. In routine cases the insolvency would come to light at this point and the Hearing Commissioner could certify to the State Fund that a payment should be made.

Of course, some cases will not follow the normal pattern. Some insolvency complaints will undoubtedly come into the Commission or the State Fund before an award is made or, possibly, before a worker's compensation claim is filed. These should be routed through routine channels so that compliance with the statutory prerequisite of an award may be assured. It would serve no purpose to take any action relative to the determination of insolvency before an award has been made.

Based upon our interpretation of the statute, we would recommend the following steps in handling insolvency claims:
1. Regardless of how the insolvency complaint is received by the Industrial Commission, the claim should proceed as any other normal worker's compensation claim until an award has been made.

2. After it is determined that the employer has not paid the benefits ordered by the Commission, the matter should be referred to a compliance officer just as routine noncompliance matters are handled now. In most cases the nonpayment and the determination of insolvency could be handled simultaneously in a noncompliance hearing before a single Commissioner.

3. Once the Hearing Commissioner has determined that the employer is indeed insolvent, he will so certify to the State Fund and a payment will be made from the fund.

***2** As to your second question, the statute provides that it will take effect upon the approval of the Governor. The Governor approved this particular statute on February 24, 1982. Therefore, the insolvency fund would apply to claims which were filed on or after that date. There is nothing in the statute which would indicate any intent on the part of the General Assembly to make this provision retroactive. Absent such intent the statute must be considered prospective only. Pulliam v. Doe, 142 S.E.2d 861, 246 S.C. 106 (1965). An injury which occurred prior to February 24, 1982, would not be compensable from the insolvency fund unless the claim for worker's compensation was filed on or after that date.

I trust this has sufficiently answered your questions. If not, please feel free to contact me.
Sincerely,

Clifford O. Koon, Jr.
Assistant Attorney General

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